No. 86-44

Supreme Court, U.S.
FILED
JAN 9
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SHEARSON/AMERICAN EXPRESS, INC. and
MARY ANN MCNULTY,
Petitioners,

v.

EUGENE MCMAHON, JULIA MCMAHON, individually and as trustee of THE DAVID J. HODDER & SON, INC. EMPLOYEE PENSION PLAN, THE DAVID J. HODDER & SON, INC. PROFIT SHARING PLAN, THE LAURIE FUNERAL HOME, INC. EMPLOYEE PENSION PLAN, and THE LAURIE FUNERAL HOME PROFIT SHARING PLAN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF FOR WILLIE D. CHANDLER, GEORGE FOX, ALLAN RUPEL AND S. DAVID ROCKOFF AS AMICI CURIAE SUPPORTING RESPONDENTS

STIRLING LATHROP
Counsel of Record
Greenfield & Chimicles
One Haverford Centre
Haverford, PA 19040-0100
215-642-8500
Attorneys for Amici Curiae

Richard D. Greenfield
M. Katherine Meermans
Greenfield & Chimicles
Haverford, PA 19040-0100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-44

SHEARSON/AMERICAN EXPRESS, INC. and
MARY ANN MCNULTY,
Petitioners,

v.

EUGENE MCMAHON, JULIA MCMAHON, individually and as trustee of THE DAVID J. HODDER & SON, INC. EMPLOYEE PENSION PLAN, THE DAVID J. HODDER & SON, INC. PROFIT SHARING PLAN, THE LAURIE FUNERAL HOME, INC. EMPLOYEE PENSION PLAN, and THE LAURIE FUNERAL HOME PROFIT SHARING PLAN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Willie D. Chandler, George Fox, Allan Rupel and S. David Rockoff hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of the attorneys for the respondent has been obtained. The consent of the attorney for the petitioner was requested but refused. Correspondence concerning the requests for permission to file a brief *amici curiae* in this case have been filed with the Clerk of this Court.

The interest of Willie Chandler in this case arises from the fact that he is a party to a case presently pending in the Court of Appeals for the Eleventh Circuit which involves one of the issues before this Court, namely, whether a pre-dispute agreement to arbitrate claims arising under Section 10(b) of the Securities Exchange Act of 1934 is enforceable. *Willie D. Chandler v. Drexel Burnham Lambert, Inc.*, No. 85-8946, C. A.

11. Similarly, the interest of George Fox and Allan Rupel in this case arises from the fact that they are parties to a case presently pending in the Court of Appeals for the Fourth Circuit which involves the same issue. *George Fox and Allan Rupel v. Dean Witter Reynolds, Inc. and Stuart Kimball,* No. 85-2298, C. A. 4 (consolidated for briefing and argument *sub nom. Jan-Olaf Blomquist and Vanja Blomquist v. Dean Witter Reynolds, Inc.,* No. 85-2513, C. A. 4). The interest of S. David Rockoff arises from the fact that he is a party to a case presently pending in the Court of Appeals for the Eleventh Circuit involving both issues before this Court in this case, namely, enforceability of pre-dispute agreements to arbitrate claims under Section 10(b) of the Exchange Act and the arbitrability of claims arising under the Racketeer Influenced Corrupt Organizations Act. *S. David Rockoff, et al v. Shearson-Lehman/American Express, Inc.,* No. 86-5177 C. A. 11.

It is believed that the brief which *amici curiae* are requesting permission to file may contain a more detailed argument than will be presented by the respondents' brief on the issues of Congressional intent to prevent waiver of pre-dispute agreements to arbitrate claims arising under the Exchange Act, including claims under Section 10(b) of that Act, and on the question of the circumstances under which a private litigant is not to be bound by a prospective waiver of a right to proceed in the judicial forum with claims which implicate public concerns. If these arguments are accepted, they will be dispositive of this case.

Date: January 9, 1987 Respectfully submitted,

By: _____

Stirling Lathrop
Counsel for Willie D. Chandler,
George Fox, Allan Rupel and
S. David Rockoff
Greenfield & Chimicles
One Haverford Centre
Haverford, PA 19041-0100
(215) 642-5800

No. 86-44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SHEARSON/AMERICAN EXPRESS, INC. and
MARY ANN MCNULTY,
Petitioners,

v.

EUGENE MCMAHON, JULIA MCMAHON, individually and as trustee of THE DAVID J. HODDER & SON, INC. EMPLOYEE PENSION PLAN, THE DAVID J. HODDER & SON, INC. PROFIT SHARING PLAN, THE LAURIE FUNERAL HOME, INC. EMPLOYEE PENSION PLAN, and THE LAURIE FUNERAL HOME PROFIT SHARING PLAN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR WILLIE D. CHANDLER, GEORGE FOX, ALLAN RUPEL AND S. DAVID ROCKOFF AS AMICI CURIAE SUPPORTING RESPONDENTS

STIRLING LATHROP
Counsel of Record
Greenfield & Chimicles
One Haverford Centre
Haverford, PA 19040-0100
215-642-8500
Attorneys for Amici Curiae

Richard D. Greenfield
M. Katherine Meermans
Greenfield & Chimicles
Haverford, PA 19040-0100

QUESTIONS PRESENTED

1. Whether a pre-dispute agreement which waives the provisions of Section 27 of the Securities Exchange Act of 1934 in the context of a private civil action under Section 10(b) of that Act is unenforceable under Section 29(a) thereof as a stipulation waiving compliance with any provision of the Act; and

2. Whether, a private civil action under RICO is arbitrable, since the action implicates the public interest and involves embryonic law?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	ii
BRIEF AMICI CURIAE	1
Interest of Amici Curiae	1
Summary of Argument	2
ARGUMENT	4
I. Overview	4
II. As a Matter of the Express Intent of Congress, Section 29(a) of the Securities Exchange Act of 1934 is a General Limitation on the United States Arbitration Act and Renders Pre-Dispute Agreements to Arbitrate All Exchange Act Claims Unenforceable	10
III. Consistent With the United States Arbitration Act, A Defendant in a Private Action Under the Racketeer Influenced and Corrupt Organizations Act Does Not Have the Right to Compel Arbitration of the Action Because There is Significant Risk That Arbitration Will Diminish The Public Purpose of the Private Action	16
CONCLUSION	22

TABLE OF AUTHORITIES

	Page
CASES	
Alexander v. Gardner Denver Co., 415 U.S. 36 (1974)	4, 5, 16
Barrentine v. Arkansas-Best Freight Systems Inc., 450 U.S. 728 (1981)	4, 5, 10, 16
Bernhardt v. Polygraphic Company of America, 350 U.S. 198 (1956)	4, 5
Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 252 U.S. 436 (1920	9
Brooklyn Savings Bank v. O'Neill, 324 U.S. 697 (1945)	17
Cannon v. University of Chicago, 441 U.S. 677 (1979)	10
Chiarella v. United States, 445 U.S. 222 (1980)	10
County of Cook v. Midcon Corp., 574 F. Supp 912 (N.D. Ill. 1983)	19
Dean Witter Reynolds, Inc. v. Byrd, ____U.S.____, 105 S.Ct. 1238 (1985)	5
Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976)	13
Herman & MacLean v. Huddleston, 459 U.S. 375 (1983)	13
Lorrilard v. Pons, 434 U.S. 575 (1978)	13
McDonald v. City of West Branch, Michigan, 104 S. Ct. 1799 (1984)	4, 5, 16
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982)	13
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. (1985)	*passim*
Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983)	5
Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc., No. 86-1021, slip op. (1st Cir., Nov. 26, 1986) (available on Lexis, Genfed Library, U.S. App. File)	20
Peil v. Speiser, No 85-1360 slip op. (3rd Cir. Nov. 28, 1986)	9
Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)	5

	Page
Sanders v. Robinson Humphrey/American Express, Inc., 634 F. Supp. 1048 (N.D. Ga. 1986)	2
Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974)	13, 14
Sedima S.P.R.L. v. Imrex Co. Inc., 105 S. Ct. 3275 (1985)	17, 21
Southland Corp. v. Keating, 465 U.S. 1 (1984)	5
Stephenson v. Calpine Conifers II, Ltd., 652 F.2d 808 (9th Cir. 1981)	10
Walton v. Morgan Stanley & Co. Inc., 623 F.2d 796 (2d Cir. 1980)	10
Wilko v. Swan, 346 U.S. 427 (1953)	*passim*
STATUTES, RULES AND REGULATIONS	
United States Arbitration Act	
9 U.S.C. § 1 *et. seq.*	*passim*
Clayton Act	
Section 4, 15 U.S.C. § 815	19
Civil Rights Act of 1964	
Title VII, 42 U.S.C. § 2000 e et seq.	16
Fair Labor Standards Act	
29 U.S.C. § 201-209	16
Racketeer Influenced and Corrupt Organizations Act	
18 U.S.C. § 1961 et seq.	*passim*
Securities Act of 1933	
Section 14, 15 U.S.C. § 77n	*passim*
Section 22(a), 15 U.S.C. § 77v(a)	*passim*
Securities Exchange Act of 1934	
Section 10(b), 15 U.S.C. § 78j(b)	*passim*
Section 15B(b)(2)(D), 15 U.S.C. § 78o-4(b)(2)(D)	12
Section 21(g), 15 U.S.C. § 78u(g)	13
Section 27, 15 U.S.C. § 78aa	*passim*
Section 28(b), 15 U.S.C. § 78bb(b)	11,12
Section 29(a), 15 U.S.C. § 78cc(a)	*passim*
United States Code	
28 U.S.C. § 1407	13
42 U.S.C. § 1983	16

Page

LEGISLATION AND LEGISLATIVE REPORTS

S. 249, 94th Cong., 1st Sess. 1975, 121 Cong. Rec. 11786 13

H.R. Rep. No. 94-229, 94th Congress, 1st Sess. 91, U.S. Code Cong. & Ad. News, 1975, p. 342 12,13

S. Rep. 94-75, 94th Cong., 1st Sess. 74-75, U.S. Code Cong. & Ad. News, 252-3 (1975) 13

LEGISLATIVE HEARINGS

Securities Acts Amendments of 1975:

Hearings on S. 249 before the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess. 1 (1975) 11

ARTICLES

Cohen and Dayton, *The New Federal Arbitration Law,* 12 Va. L. Rev. 265 (1926) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-44

SHEARSON/AMERICAN EXPRESS, INC. and
MARY ANN MCNULTY,
Petitioners,

v.

EUGENE MCMAHON, JULIA MCMAHON, individually and as trustee of THE DAVID J. HODDER & SON, INC. EMPLOYEE PENSION PLAN, THE DAVID J. HODDER & SON, INC. PROFIT SHARING PLAN, THE LAURIE FUNERAL HOME, INC. EMPLOYEE PENSION PLAN, and THE LAURIE FUNERAL HOME PROFIT SHARING PLAN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR WILLIE D. CHANDLER, GEORGE FOX, ALLAN RUPEL AND S. DAVID ROCKOFF AS AMICI CURIAE SUPPORTING RESPONDENTS

INTERESTS OF AMICI CURIAE

Amici curiae are customers of securities brokerage firms. Like the respondents in this case, the *amici* signed pre-dispute agreements to arbitrate all disputes arising out of their dealings with the brokerage firms. And like the respondents in this case,

amici are parties to cases pending in the Federal Courts of Appeal that involve one or both of the issues herein.[1] The procedural outcome of those actions will be affected by the Court's decision herein.

In addition, Willie D. Chandler brought his claims under Section 10(b) of the Securities Exchange Act of 1934 on behalf of himself and a proposed class of persons with similar claims. He reasonably believes that the outcome of this case will determine whether class actions against brokerage firms will be viable as a function of a brokerage firm's routine use of pre-dispute arbitration agreements.[2]

Amici seek to clarify and make uniform the law on the issues in this case so that the rights of investors with claims under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (the "Exchange Act") and/or under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962-64 ("RICO") are certain.

SUMMARY OF ARGUMENT

In *Wilko v. Swan*, 346 U.S. 427 (1953) ("Wilko"), this Court interpreted language in Section 14 of the Securities Act of

---

[1] *Willie D. Chandler v. Drexel Burnam Lambert, Inc.*, No. 85-8946 (11th Cir.); *George Fox and Allan Rupel v. Dean Witter Reynolds, Inc. and Stuart Kimball*, No. 85-2298 (4th Cir.); and *S. David Rockoff, et al v. Shearson-Lehman/American Express, Inc.*, No. 86-5177 (11th Cir.). Decisions are pending in each of these cases and, thus, *amici* have not petitioned for writs of certiorari or responded to petitions for writ of certiorari in those cases.

[2] In *Sanders v. Robinson Humphrey/American Express, Inc.*, 634 F. Supp. 1048 (N.D. Ga. 1986), the District Court denied a motion for certification of a plaintiff class based on claims arising under the Securities Act, the Exchange Act and state law. The Court denied the motion primarily because of the pre-dispute arbitration agreements between the defendants and some members of the proposed class. *Sanders*, 634 F. Supp. at 1064-65. The Court said, "To allow class certification where such arbitration agreements exist would not only be unduly burdensome and inefficient should defendants move to compel arbitration but would also violate the requirement of Rule 23(b)(3) that the class action be 'superior to other available methods for the fair and efficient adjudication of the controversy.' Fed. R. Civ. P. 23(b)(3)." *Id.* at 1065.

1933, 15 U.S.C. § 77n (the "Securities Act"), prohibiting the waiver of compliance with any provision of the Securities Act, to mean that investors could not be compelled to waive, in advance of an actual dispute, their right to select between the judicial and arbitrable forms for resolution of Securities Act claims. In 1975, Congress ratified that interpretation. Furthermore, in amending Sections 15B and 28(b) of the Exchange Act in 1975, Congress expressed its intent that Section 29(a) of the Exchange Act, like its equivalent, Section 14 of the Securities Act, operate as a general limitation on the United States Federal Arbitration Act 9 U.S.C. § 1 *et seq.* (the "Arbitration Act"). Because this recognition serves purposes consistent with the policies of the Securities Act and the Exchange Act, and because Congress did ratify Wilko's analysis in Section 14, there is no basis for now assuming that Congress intends for the courts to withdraw from investors the right to wait to select between the judicial and arbitral forums until such time as an actual dispute arises under the Securities Act or the Exchange Act.

The *Wilko* opinion did not spring from prejudice against arbitration. Instead, it merely decided when an investor had the right to choose between the arbitral and judicial forums for resolution of Securities Act claims. In doing so, *Wilko* simply recognized that differences do exist between the arbitral and judicial forums and that investors may perceive those differences to be significant their relationship with those in the securities industry. The Arbitration Act itself does not signify Congressional recognition that the arbitral and judicial forums are equivalent. In recognizing differences between the arbitral and judicial forums which may be or may be perceived to be significant to investors, *Wilko* did no more than this Court has done in a number of other decisions, none of which can be said to be based on this Court's prejudice against arbitration. The opinion of the United States Court of Appeals for the Second Circuit below, *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986) was wholly correct in not retreating from the implications of *Wilko* and Congress' intent that investors not be bound by pre-dispute agreements to arbitrate claims arising under the Exchange Act.

Given that Congress intended that private actions under RICO be judicially enforced and given that private actions under RICO serve to enhance the overall enforcement of RICO's deterrent purposes, it was appropriate for the Court of Appeals below to continue to recognize the validity of the *"American Safety"* doctrine, *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), especially in light of this Court's consistent recognition of and concern for the risk the arbitration poses to the effectuation of federal statutory remedies. The legal complexity of RICO arising from the unsettled dimensions of its private remedy confirm that the second Circuit's application of the *American Safety* doctrine was appropriate and was not in conflict with any decisions of this Court.

I. Overview

Whether a person should be bound by a pre-dispute arbitration agreement would not be an issue in this or any other case if there were no differences between arbitration and litigation in the courts. However, there are differences. This court has found that, in contrast to the judicial forum, (1) the arbitral forum may not provide the legal expertise required to resolve certain, complex, legal questions; (2) arbitrators may not have authority to enforce statutory remedies; (3) the fact finding process in the arbitral forum does not provide for as complete a record of proceedings as does the judicial forum; (4) arbitration does not apply usual rules of evidence; (5) rights and procedures common to civil trials, including discovery and compulsory process of non-parties, are not available; and (6) judicial review of arbitral proceedings is more limited than judicial review of judicial proceedings. *McDonald v. City of West Branch*, 104 S. Ct. 1799 ("McDonald"); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) ("Barrentine"); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) ("Gardner-Denver"); *Bernhardt v. Polygraphic Company of America*, 350 U.S. 198, 203 (1956) ("Bernhardt"); *Wilko v. Swan*, 346 U.S. 427 (1953) ("Wilko").

Because of the differences between the arbitral and judicial forums, this Court has recognized that the choice between the

arbitral and judicial forums inevitably affects the scope of substantive rights to be vindicated, *Gardner-Denver,* 415 U.S. at 56, citing *U.S. Bulk Carriers v. Arguelles,* 400 U.S. 351, 359-360 (1971) (Harlan, J. concurring); that arbitral processes are not commensurate with judicial processes, *id;* that the change from a court of law to an arbitration panel may make a radical difference in ultimate result, *Bernhardt,* 350 U.S. at 203; and that although arbitration is well suited to resolving contractual disputes, it cannot, in certain circumstances, adequately protect federal statutory and constitutional rights. *McDonald,* 104 S.Ct., at 1803-1804, *Barrentine,* 450 U.S., at 740-746, *Gardner-Denver,* 415 U.S., at 56-60. These conclusions cannot be attributed to any supposed prejudice by this court against arbitration. *See generally, Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc.,* 105 S.Ct. 3346 (1985) (*"Mitsubishi"*); *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213 (1985) *("Byrd"); Southland Corp. v. Keating,* 465 U.S. 1 (1984); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1 (1983) *("Moses H. Cone Memorial Hospital"); Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967) *("Prima Paint").*[3] Rather, such conclusions are based simply on recognition of the differences between the arbitral and judicial forums.

---

[3] The American Arbitration Association ("AAA"), as *amicus curiae* in this case, argues that this court's decision in *Wilko* reflected "precisely the kind of judicial hostility to arbitration that was expressly rejected by Congress in the passing the Arbitration Act." Brief of American Arbitration Association as *Amicus Curiae* in Support of Petitioners, 12 (hereinafter "AAA Brief"). In holding unenforceable pre-dispute agreements to arbitrate claims under Section 12(2) of the Arbitration Act, the Court in *Wilko* did what this Court has done *McDonald, Barrentine, Gardner-Denver and Bernhardt,* that is, it recognized the difference between arbitration and litigation in the Courts. On the basis of those differences and the relationship of Sections 14 and 22 of the Securities Act, the Court determined simply that Congress intended for an investor to have the right to wait until an actual dispute arises before waiving any right to select between the judicial and arbitral forums. Implicit in the *Wilko* opinion is the understanding that, when an actual dispute arises, an investor with a claim under Section 12(2) can choose to arbitrate such a claim. As then-Judge Stevens noted in a dissenting opinion in *Alberto-Culver Co. v. Scherk,* 484 F.2d 611, 615-18 (7th Cir. 1973), *rev'd.,* 417 U.S. 506 (1974), *Wilko* "merely decided *when* plaintiff may not waive a right. . . ."

Although the selection of the arbitral instead of the judicial forum does not *necessarily* mean that rights will not be fully vindicated, the differences between the two forums always pose such a possibility. By signing a pre-dispute arbitration agreement, a party to the agreement always accepts the risk that the arbitration may not fully vindicate rights or may not vindicate them at all.

That there is a federal policy favoring arbitration which compels a hospitable inquiry into the circumstances under which a person waives a right to the judicial forum, *Moses H. Cone Memorial Hospital,* 460 U.S. at 24-5, does not mean that Congress has recognized an equivalence between that forum and the arbitral one. As interpreted by this Court in *Mitsubishi, Byrd, Moses H. Cone,* and *Prima Paint,* the Arbitration Act expresses Congress' recognition *not* that arbitration is equivalent to judicial resolution of dispute but that, in general, it is acceptable, in advance of a dispute, for the parties to contract for and accept the risk that resolution of their dispute will be different from the resolution that would obtain in a judicial forum.

Presumably, persons will not accept that risk if they perceive that the differences between arbitration and litigation in the courts will deprive them of a right.

The legislative history of the Arbitration Act shows if not that the Act "was to have a limited application to contracts between merchants for the interstate shipment of goods . . .", *Prima Paint,* 388 U.S. at 409 (Black, J. dissenting), then at least that Congress' attention was focused only on arbitration of such contracts and not the arbitration of statutory claims. Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong. 4th Sess., 3, 5, 7, 9, 10 (1923) ("Hearing on S. 4213 and S. 4214"); Arbitration of Interstate Commercial Disputes, Hearing on H.R. 646 and S. 1005 before the Joint Committee of the Subcommittees on the Judiciary, 68th Cong., 1st Sess. 7, 27 (1924) ("Joint

Hearings"). Indeed, one of principal participants in the drafting of and Congressional hearings on the Arbitration Act [4] wrote one year after its enactment:

> Not all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non performance, and the like. It has a place also in the determination of the simpler questions of law—the questions of law which arise out of these daily relations between merchants as to the passage of title, the existence of warranties, or the questions of law which are complementary to the questions of fact which we have just mentioned. It is not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes. Speaking generally, it is a proper remedy for the determination of these classes of disputes which arise day by day in the common experience of the disputants and the individuals to whom the dispute is to be referred, where all meet upon a common ground.

Cohen and Dayton, *The New Federal Arbitration Law,* 12 Va. L. Rev. 265, 281 (1926)

The petitioners and *amici* supporting the petitioners make the point that arbitration is improved, that the differences between arbitration and judicial litigation have been minimized, and that disputes under Section 10(b) such are as involved in this case are fairly typical, routine disputes—thus, warranting arbitration. Two of these points may be assumed to be true: (1) that arbitration has been improved and (2) that differences between the arbitral and judicial forums have been minimized. It does not follow from this, however, that there are no differences. Judicial review is still limited to review for manifest disregard for the law, not for error. *Wilko,* 346 U.S., at 436-7. Only the AAA, whose rules would not be applied under the arbitration agreement in this case, suggests that arbitrators may provide a statement of the reasons for their

[4] *See,* Joint Hearings, 13 (Statement of Julius Cohen).

decisions, but even then, this is not a matter of AAA rules, but of practice dependant on the request of the parties. AAA Brief, 14, text and n. 15. Thus, there is still a reasonable basis for perceiving differences between the arbitral and judicial forums which may be outcome determinative.

Petitioners assert that the dispute under Section 10(b) involved in this case is "fairly typical." Brief of Petitioners, 36. That may be true in the experience of the petitioners, the members of the securities industry as a whole, and in the experience of the arbitrators who routinely hear such cases. But nothing in the record of this case and no assertion by petitioners or any of the *amici* supporting petitioners even suggests, much less permits the Court to believe, that the dispute here is a "fairly typical" one for the respondents or investors generally.

For the respondents and persons like the respondents, the circumstances of the dispute here cannot be assumed to arise day by day in their experience and to provide a basis for a common ground among the petitioners, the respondents and the arbitrators. The briefs of petitioners and *amici* in support of petitioners compel recognition that the petitioners and arbitrators may share a common ground. This ground is not shared by the respondents or investors like the respondents.

Precisely because there still are differences between the arbitral and judicial forum which an investor might perceive as significant to the outcome of his case and because there is no necessary common ground on which the respondents, petitioners and arbitrators meet in a case under Section 10(b), the legitimate issue is whether Congress intended to and has preserved for an investor the right to wait until a dispute arises to decide which forum to choose. As discussed in Section II of this Argument, Congress did preserve that right.

The common ground between arbitrators, claimants and defendants is eroded further when the nature of a dispute, either because of its factual complexity or legal complexity or some other reason, takes it out of the day-to-day experience of the arbitrator. This would almost always be true where questions of law are not simply complementary to questions of

fact or where the law still requires judicial development. Arbitrators may, under arbitration agreements like the one at issue here, be required to follow the law and may be presumed competent to apply it. However, there can be no presumption that Congress intends for them to develop the law, especially where Congress has provided for exclusive federal jurisdiction and, thereby, has denied presumably competent state courts a role in the interstitial interpretation of a statute. *See, e.g., Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U.S. 436, 440-41 (1920). This is not to say that other considerations would not permit the courts to reduce their sensitivity to a Congressional mandate of exclusive jurisdiction. Thus, in *Mitsubishi,* "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes," *id.*, 105 S.Ct. at 3355, together with Congress' ratification, 9 U.S.C. § 201 *et seq.*, of the Convention on the Recognition and Enforcement of Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, permitted the Court to enforce a pre-dispute agreement to arbitrate claims under United States antitrust laws in an international transaction where development of and consistent application of United States law may be of less concern than in the non-international context.

Especially where the law is developing, as it still is even under Section 10(b)[5] and RICO,[6] the availability of judicial competence and judicial review are significant to effectuation of statutory law.

As discussed in the next section of this brief, Congress has preserved for investors the right to select the judicial forum for actions under Section 10(b), regardless of the routine experience of arbitrators to apply the law of Section 10(b) in "routine" situations. Even if Congress had not done so, as is true in the RICO statute, it is legitimate and correct to inquire

---

[5] For example, the concept of "fraud on the market" as a valid basis for presuming reliance required to prove an action under Section 10(b), is still a developing issue in the federal courts of appeal. *See*, e.g., *Peil v. Speiser*, No. 85-1360, slip op. (3rd Cir., Nov. 28, 1986)

[6] *See, infra*, at 22.

whether constraints external to the parties' arbitration agreement foreclose arbitration. *Mitsubishi,* 105 S.Ct., at 3355. Where, as with *RICO,* the law is nascent and even the courts are troubled by it, or as with the Fair Labor Standards Act, the need for decades of statutory interpretation suggests a difficult area of the law, *Barrentine,* 450 U.S., at 743, the institutional obligation of the courts to enforce federal statutory policy provides a compelling basis for inquiry into a statute's arbitrability. *Id.* at 744-45.

In this case, Section 29(a) of the Exchange Act makes such an inquiry unnecessary as to the arbitrability of investors' claims under Section 10(b). However, as discussed in Section III of this Argument, the inquiry not only is legitimate but also necessary to secure the full implementation of the federal policies of RICO.

II. As a Matter of the Express Intent of Congress, Section 29(a) of the Securities Exchange Act of 1934 is a General Limitation on the United States Arbitration Act and Renders Pre-Dispute Agreements to Arbitrate All Exchange Act Claims Unenforceable.

In the structure and legislative history of the Exchange Act, Congress has manifested its intent that pre-dispute agreements to arbitrate claims arising under that Act, including claims under Section 10(b), are not to be enforced.

Section 27 of the Exchange Act secures for investors in "any and all actions" to "enforce any liability or duty created" by the Act, the right to bring such actions in court, in particular, in the Federal courts. 15 U.S.C. § 78aa. Section 10(b) of the Exchange Act establishes a duty on the part of participants in securities markets not to use manipulative or deceptive devices in connection with the purchase or sale of registered or unregistered securities in interstate commerce. *See, Chiarella v. United States,* 445 U.S. 222 (1980); *Stephenson v. Calpine Conifers II, Limited,* 652 F.2d 808 (9th Cir. 1981); *Walton v. Morgan Stanley & Co., Inc.,* 623 F.2d 796 (2d Cir. 1980). *See also, Cannon v. University of Chicago,* 441 U.S. 667, 690 n.13. Necessarily, Section 27 secures for the Section 10(b) claimant the right to select the judicial forum for resolution of Section

10(b) claims, and, necessarily, a pre-dispute arbitration agreement waives a Section 10(b) claimant's right to select the judicial forum.

Whether Congress has protected against an investor's pre-dispute waiver of Exchange Act rights depends upon the scope of the language of Section 29(a) prohibiting any person to be bound to waive compliance with any provision of the Exchange Act.

That Section 29(a) is a general limitation on the Arbitration Act and secures investors against prospective waiver of their Section 27 rights is confirmed in the text, structure and legislative history of the Exchange Act.

In 1975, as part of the "most substantial and significant revision of this country's federal securities laws since . . . 1934," [7] Congress amended Section 28(b) of the Exchange Act to address arbitration under procedures established by self-regulatory organizations to settle disputes between members or Act to address arbitration under procedures established by self-regulatory organizations ("SRO") to settle disputes between members or participants in the SROs. Sections 28(b)(1) and (2) insure that no other provision of the Exchange Act will operate to bar disputes between members or participants of SROs where the SRO has established such a procedure. Neither Section 28(b)(1) nor Section 28(b)(2) requires a member or participant in the SRO to agree to compulsory arbitration in order to be subject to it. Section 28(b)(3) is different. In order for a person subject to Section 28(b)(3) to be bound to arbitrate a dispute in accordance with SRO arbitration rules governing SRO members or participants, that person must agree to be bound by those rules. Once agreeing to arbitrate, the person cannot be relieved of the contract by resort to any other provisions of the Exchange Act. However, unless there is some other provision of the Exchange Act to resort to avoid the agreement's consequences the general scope of the Arbitration Act would be sufficient to compel a person who agreed to arbitration under SRO rules to honor this agreement.

---

[7] Securities Acts Amendments of 1975: Hearings on S. 249 before the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess. 1 (1975).

Thus, in the absence of such other provision, Section 28(b)(3) would be wholly unnecessary. At the very least, then, its inclusion expresses Congress' understanding and intent that some provision of the Exchange Act operates as a general limitation on the Arbitration Act, necessitating the provisions of Section 28(b)(3).

Also in 1975, Congress established and enumerated the rule making responsibilities of the Municipal Securities Rule Making Board (the "Board"). Pub. L. 94-29, § 13, 89 Stat. 131. As a result Exchange Act Section 15 B(b)(2)(D), 15 U.S.C. §78o-4(b)(2)(D), empowers the Board to provide for arbitration of "claims, disputes and controversies relating to transactions in municipal securities." *Id.* However, the Board's arbitration rules may not compel a municipal securities customer to submit to such arbitration "except at his instance and in accordance with" Section 29 of the Exchange Act. *Id.* By itself, the language "at his instance" might permit a pre-dispute agreement to arbitrate. But Section 15B(b)(2)(D) requires that the customer's "instance" also be in accordance with Section 29 of the Exchange Act. If Section 29 meant only that a customer cannot waive a dealer's compliance with Exchange Act provisions, then requiring a customer's arbitration agreement to be "in accordance with" Section 29 is essentially meaningless because a dealer's compliance with Exchange Act obligations is not at issue in an arbitration agreement. "In accordance with Section 29" is meaningful, then, only if Section 29 means that a customer is protected from agreements which waive the customer's rights, including rights under Section 27 of the Exchange Act.

That Congress understands and intends that Section 29(a) operates to preclude waiver of a customer's rights under the Exchange Act, and not simply waiver of a defendant's obligations under the Act, is confirmed by the legislative history of the Securities Act Amendments of 1975, Pub. L. 94-29, 89 Stat. 97 (the "1975 Amendments"). In connection with amendments to Exchange Act Section 28(b), the Conference Report stressed: "It was the clear understanding of the conferees that this amendment did not change existing law, as articulated in *Wilko v. Swan,* 346 U.S. 427 (1953), concerning the effect of arbi-

tration proceedings provisions and agreements entered into by persons dealing with members and participants of self-regulatory organizations." H.R. Rep. No. 94-229, 94th Cong. 1st Sess., 111 (1975), U.S. Code Cong. & Admin. News, 1975, p. 342 (hereinafter, the "Conference Report").

In *Wilko,* the Court held that Section 14 of the Securities Act prohibited pre-dispute agreements to arbitrate because those agreements waived the customer's rights under Section 22. *Wilko,* 346 U.S., at 432-3, 434-5. *Wilko's* holding is predicated on interpretation of Section 14's "waive compliance" language to prohibit waiver of investors' rights, not just waiver of a seller's obligations under the Act. *Wilko v. Swan,* 346 U.S. at 434-35. The Conference Report confirms that with the 1975 Amendments Congress ratified *Wilko's* interpretation of Section 14. If Congress did not intend Section 14 of the Securities Act (or its equivalent, Section 29(a) of the Exchange Act) to bar the waiver of an investor's rights generally, and not just the waiver of the defendant's obligations under the Act, Congress could have rejected *Wilko's* interpretation of the "waive compliance with" language in Section 14. But, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . ." *Lorillard v. Pons,* 434 U.S. 575, 580 (1978). *See also, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U.S. 353, 381-2 (1982), *Herman & MacLean v. Huddleston,* 459 U.S. at 385-6. Here, one need not merely presume that Congress was aware of *Wilko's* interpretation of Section 14. The legislative history of Section 28(b) makes clear Congress' full awareness of *Wilko* and its acceptance of the law as articulated by *Wilko.* Necessarily, the equivalence of Section 14 of the Securities Act and Section 29 of the Exchange Act extends *Wilko's* interpretation to the Exchange Act as well.

The Securities Exchange Commission (the "SEC" or the "Commission") minimizes the *Wilko* analysis of Section 14 by noting that *Scherk v. Alberto-Culver Co.,* 417 U.S. 506 (1974), questioned *Wilko's* applicability to Exchange Act claims. *See,* Brief for the Securities and Exchange Commission as Amicus Curiae Supporting Petitioners, 19, n. 14 ("SEC Brief"). This

overlooks the fact that *Scherk* did not criticize or question *Wilko's* analysis of the "waive compliance" language of Section 14 of the Securities Act. In addition, the SEC's analysis overlooks two other important aspects of *Scherk:* (1) *Scherk* accepted *arguendo* the premise that *Wilko v. Swan* did apply in the context of Section 10(b) claims, and (2) *Scherk's* analysis of *Wilko's* applicability was characterized by the Court in *Scherk* as a "colorable argument," not an analysis. In fact, in Part C of the SEC Brief, 21, the Commission itself notes that "... the Court's opinion in *Sherk* [does not go] beyond pointing out *potential* grounds of distinction and indicating the impossibility of automatically and 'mechanically transplant[ing]' the *Wilko* decision to 1934 Act (470 U.S. at 224 ...." Indeed, the majority opinion in *Byrd,* 105 S. Ct. at 1240 n.1, explicitly noted that *Scherk* "did *not* ... hold that *Wilko* would not apply in the context of a Section 10(b) or rule 10(b)-5 claim ...." (Emphasis added.)

If anything, when Congress said that it did not intend to change existing law as articulated in *Wilko v. Swan,* it could not have understood *Scherk* to have been inconsistent with the applicability of *Wilko* in the context of a Section 10(b) claim in a non-international transaction. Furthermore, as the Commission demonstrates convincingly, SEC Brief, 21-26, the potential grounds of distinction raised in *Scherk* do not, on analysis provide a basis for holding that pre-dispute agreements to arbitrate claims arising under Section 10(b) are enforceable.

The Commission also argues that Congress would not now object if this Court were to revise its interpretation of Securities Act Section 14. SEC Brief, 19, n. 14. But this is not necessarily so. The difference between arbitration and litigation, recognition of which does not acknowledge a judicial or legislative prejudice against arbitration, may not *necessarily* dictate a different result as a function of forum selection, but still inherently poses a risk that the choice between arbitration and litigation in courts *might* be outcome determinative. To require an investor to sign a pre-dispute agreement to arbitrate all disputes imposes on the investor the burden of knowing what "all disputes" there might be, the elements of each potential action, and the burden of proof each might require. This is a sophisticated and potentially expensive analysis.

It is surely consistent with the protective philosophy of the Federal securities laws, *Wilko,* 346 U.S., at 431, 435, to protect the investor from this burden. When a dispute arises, the advocates of arbitration and of judicial litigation are no less able to present their competing views to the investor, and if those views are meritorious, the investor is no less able—to the contrary, is better able—to choose the forum whose benefits best suit him. The investor does not lose the right to arbitrate, and by waiting until a dispute arises, the investor is assured that he is on an equal footing with an industry that has ready access to legal resources.

Because of its day-to-day experience with customer disputes, the securities industry may forget that what it views as a "fairly typical" dispute (*see,* Brief of Petitioners, 36) is, to the investor, a matter of tremendous individual importance, both in personal financial terms and in terms of the appearance of the integrity of the marketplace. Protecting the substance and appearance of integrity of investors' relationship to the securities industry at the expense of predictability is as legitimate a congressional concern as protection of integrity of the marketplace itself. Thus, there is no reason to suppose that Congress would relinquish the protective role that Section 29(a) now plays.

In 1975, Congress did provide a specific expression of its intent that pre-dispute agreements to arbitrate Section 10(b) claims should not be enforced. In ratifying *Wilko,* Congress made it clear that Section 29(a) operates broadly to preserve an investor from the risks inherent in the premature waiver of the investor's Exchange Act rights. Thus, to the extent that it prevents pre-dispute waiver of an investor's rights under, among other things, Section 27 of the Exchange Act, it operates as a general limitation on the Arbitration Act. Since Section 27 applies to an action under Section 10(b) of the Exchange Act, Section 29 renders unenforceable pre-dispute agreements to arbitrate Section 10(b) claims.[8]

---

[8] Nevertheless, Shearson insists that pre-dispute agreements to arbitrate Section 10(b) claims are enforceable because an action under Section 10(b) of the Exchange Act has been judicially implied and because the action is not, in Shearson's view, "special." Part C of the SEC Brief, 21-26, demonstrates fully why these arguments are not valid.

III. Consistent With the United States Arbitration Act, A Defendant in a Private Action Under the Racketeer Influenced and Corrupt Organizations Act Does Not Have the Right to Compel Arbitration of the Action, Because There is Significant Risk That Arbitration Will Diminish The Action's Public Purpose

It is implicit in every public law which provides a statutory remedy to protect a statutory right that Congress intends for the right to be protected to the fullest. Otherwise, it would not follow that a prospective waiver of a party's right to pursue the statutory remedy would be void as matter of public policy. See, *Mitsubishi,* 105 S. Ct., at 3360, n. 19.

It is also legitimate to assume that where Congress provides for the judicial enforceability of a statutory right, Congress understands that the judicial forum can and will secure the right or any remedy necessary to protect that right to the fullest. In addition, it is legitimate to assume that any alternatives to the judicial forum for resolution or protection of statutory rights and remedies must be essentially equivalent to the forum selected by Congress for the protection of those rights. These assumptions are the premises for this Court's refusal in *McDonald,* 104 S. Ct. at 1804, to fashion a rule that would preclude post-arbitration relitigation in the judicial forum of a claim under 42 U.S.C. § 1983. Similarly, these assumptions are the basis for this Court's refusal to fashion a rule of preclusion in *Barrentine,* 450 U.S., at 740-746, with respect to a claim under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, or a rule of deferral in *Alexander v. Gardner-Denver Co.,* 415 U.S., at 59-60 for a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2000e-17.

Further still, to the extent statutory rights protected by a private civil remedy require special protection or to the extent that pursuit of a private remedy might benefit the public, it is legitimate to inquire into the adequacy of the forum in which the litigant will be compelled to secure a remedy. This follows from the fact that,

> [W]here a private right is granted in the public interest to effectuate a legislative policy, waiver of a

> right so charged or colored with the public interest will not be allowed where it would abort the legislative policy which it was designed to protect.

Brooklyn Savings Bank v. O'Neill, 324 U.S. 697, 704 (1945).

In addition, Congressional provision for exclusive federal jurisdiction, especially where a private remedy implicates the public interest, would seem to reinforce the legitimacy of an inquiry about the forum in which one might be compelled to pursue the remedy, since exclusive jurisdiction serves to insure consistent, uniform development of the law. At issue is not an arbitration tribunal's ability to *apply* the law to a set of facts. If an arbitration tribunal improperly applies the law to a set of facts, only those who are parties to the arbitration are affected. But to the extent that federal courts have thereby been deprived of the opportunity to address issues arising under federal statutes, the law is not *developed* for the benefit of all whom the statute was intended to benefit. Where the private action reinforces public policies expressed in the statute, this is detrimental to the statutory regime.

The private cause of action under RICO is to be judicially enforceable. 18 U.S.C. § 1984(c).

Furthermore, as summarized by the Supreme Court in *Sedima S.P.R.L. v. Imrex Co., Inc.,* 105 S.Ct. 3275 (1985), the legislative history shows that the RICO private remedy is specifically intended to enhance RICO's overall effectiveness:

> RICO formed Title IX of the Organized Crime Control Act of 1970, Pub.L. 91-452, 84 Stat. 922. The civil remedies in the bill passed by the Senate, S.30, were limited to injunctive actions by the United States and became §§ 1964(a), (b), and (d). Previous versions of the legislation, however, had provided for a private treble damages action in exactly the terms ultimately adopted in § 1964(c). *See,* S. 1623, 91st Cong., 1st Sess., § 4(a)(1969); S. 2048, S. 2049, 90th Cong., 1st Sess. (1967).
>
> During hearings on S. 30 before the House Judiciary Committee, Representative Steiger pro-

posed the addition of a private treble damages action "similar to the private damage remedy found in the antitrust laws . . . . [T]hose who have been wronged by organized crime should at least be given access to a legal remedy. *In addition, the availability of such a remedy would enhance the effectiveness of title IX's prohibitions.*" Hearings on S. 30, and related proposals, before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., 520 (1970) (hereinafter House Hearings). The American Bar Association also proposed an amendment "based upon the concept of Section 4 of the Clayton Act." *Id.*, at 543-544, 548, 559; *see*, 116 Cong. Rec. 25190-25191 (1970). *See* also, H.R. 9327, 91st Cong., 1st Sess. (1969) (House counterpart to S. 1623).

Over the dissent of three members, who feared the treble damages provision would be used for malicious harassment of business competitors, the Committee approved the amendment. H.R. Rep. No. 91-1549, pp. 58, 187 (1970), U.S. Code Cong. & Admin. News 4007. In summarizing the bill on the House floor, its sponsor described the treble damages provision as *"another example of the antitrust remedy being adapted for use against organized criminality."* 116 Cong. Rec. 35295 (1970). The full House then rejected a proposal to create a complementary treble damages remedy for those injured by being named as defendants in malicious private suits. *Id.*, at 35342. Representative Steiger also offered an amendment that would have allowed private injunctive actions, fixed a statute of limitations, and clarified venue and process requirements. *Id.*, at 35346, *see, id.* at 35226-35227. The proposal was greeted with some hostility because it had not been reviewed in Committee, and Steiger withdrew it without a vote being taken. *Id.*, at 35346-35347. The House then passed the bill, with the treble damages provision in the form recommended by the Committee. *Id.*, at 35363-35364.

> The Senate did not seek a conference and adopted the bill as amended in the House. *Id.*, at 36296. The treble damages provision had been drawn to its attention while the legislation was still in the House, and had received the endorsement *of Senator McClellan, the sponsor of S. 30, who was of the view that the provision would be "a major new tool in extirpating the beneful influence of organized crime in our economic life." Id.*, at 25190.

105 S.Ct. at 3280-1 (emphasis added).

Finally, RICO does provide for exclusive jurisdiction of private RICO civil actions. Section 1964c of RICO is nearly identical to 15 U.S.C. § 15, Section 4 of the Clayton Act. As one court has observed:

> [I]t is well established that the identity of language between 18 U.S.C. § 1964(c) and 15 U.S.C. § 15 is not a mere happenstance; Congress consciously patterned the RICO section after the antitrust prototype . . . Legislators must have known that courts have construed virtually identical language as giving federal courts exclusive jurisdiction over antitrust claims. [*See*, e.g., *Freeman v. Bee Machinery Corp.*, 319 U.S. 448, 451 n. 6 . . . *Reh. denied*, 320 U.S. 809 . . . (1943).] *It would be anomalous . . . to hold that the jurisdictional grant under the RICO statute did anything other than create exclusive federal jurisdiction over civil claims by persons injured by violations of 18 U.S.C. § 1962.* (Emphasis added.)

County of Cook v. Midcon Corp., 574 F. Supp. 902, 912 (N.D. Ill. 1983).

Thus, the provision for the judicial enforceability of RICO claims, the importance of the private RICO action to RICO's overall effectiveness and the provision for exclusive federal jurisdiction of the private RICO action, compel inquiry into the competence of an arbitration panel to decide any complex legal questions, if RICO presents them, and compels inquiry into the willingness of arbitrators to recognize constraints of RICO's private statutory rights. Even though an individual has signed a

pre-dispute agreement to arbitrate claims arising under a federal statute, and even through the arbitration act presumes the inclusion of such statutory rights within the scope of a contract, nonetheless, it is legitimate still to examine the interrelationship of the arbitral forum and the legal rights at issue to determine whether or not that interrelationship will protect the statutory rights. That this analysis is appropriate is made plain in *Mitsubishi,* 105 S. Ct. at 3355.[9]

If only because it is still developing, RICO does present difficult and complex legal questions. As the Court noted in *Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.,* No. 86-1021, slip op. (1st Cir. November 26, 1986) (available on Lexis, Genfed Library, U.S. App. file) (emphasis added):

> . . . [P]laintiffs must show that the series of predicate acts amounted to a 'pattern of racketeering activity.' 18 U.S.C. §§ 1962 and 1964(c). *The meaning of this additional element of a civil RICO claim has yet to be clearly established in the law. See Sedima, S.P.R.L. v. Imrex Co., Inc.* . . . We note, however, that the obligation of plaintiffs to establish the existence of a 'pattern of racketeering activity' is not meaningless. . . .

Thus, although bound to follow the law, an arbitration panel coping with RICO must find it incredibly difficult to determine what the law is. Indeed, although RICO was inactive in 1970, it was not clear until 1985 that a private civil action could be brought under RICO against a defendant who had not already been criminally convicted of a predicate act, and it was not until 1985 that it was clear that a plaintiff in a private civil action under RICO would not have to prove a "racketeering injury" distinct from injury resulting from predicate acts themselves. *Sedima,* 105 S.Ct. at 3275.

---

[9] The *amici,* of course, recognize that the RICO "cause of action" remains at all times under the control of the individual litigant, see *Mitsubishi,* 105 S. Ct. at 3359, and that no citizen is under an obligation either to bring a suit or to obtain executive or judicial approval before settling one, *id.* Nevertheless, the implication of a public interest in a private remedy could compel at least a hospitable inquiry into every opportunity to permit the private litigant to pursue the private remedy in court if that will ensure a full realization of the benefits intended by Congress for the public.

In addition, RICO's nascent nature compels a need for uniform development of the law in the courts, which is only possible by exercise of federal judicial power and full judicial review. In contrast to the situation which obtained in *Barrentine,* 450 U.S. at 743, where statutory questions "must be resolved in light of evidence of legislative history in over four decades of legal interpretation of administrative ruling . . .", the situation here is the opposite. There are not four decades of legal interpretation to help.

Also, it it is not illegitimate to suspect that an arbitration panel might harbor "innate hostility to the constraints on business conduct that" RICO imposes. The courts themselves have been reluctant to impose the "stigma" of racketeering "even though a civil RICO proceeding leaves no greater stain than do a number of other civil proceedings." *Sedima,* 105 S. Ct. at 3283. If the courts are wrestling with the question whether the term "racketeer" should be imposed on certain types of business conduct (*see,* Petitioner's Brief, 47, and cases cited therein), there is a legitimate question whether arbitrators should have to wrestle the same questions.

Thus, all conditions are present in a private civil action under RICO to warrant the conclusion that its enforcement "is particularly appropriate in a judicial forum because of strong policy concerns, the need for development of the record, and judicial clarification and resulting consistency in resolving disputes under this relatively new statute." *McMahon v. Shearson/American Express, Inc.,* 788 F.2d 94, 98-9 (2d Cir. 1986).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

STIRLING LATHROP
Counsel of Record
Greenfield & Chimicles
One Haverford Centre
Haverford, PA 19040-0100
215-642-8500
Attorneys for Amici Curiae

Richard D. Greenfield
M. Katherine Meermans
Greenfield & Chimicles
Haverford, PA 19040-0100